,REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 10 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 42 of 2015 of the Chief Magistrate's Court at Naivasha, P. Gesora – CM)

B N M.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant herein was charged with Incest contrary to Section 20 (1) of the Sexual Offences Act. In that, between 28th day of November, 2013 and 26th day of July, 2015 in Naivasha Sub-county within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of **F.W.N.** a girl aged 17 years, whom to his knowledge was his daughter. Following a full trial, he was found guilty and convicted. He was sentenced to life imprisonment.

2. Aggrieved with the outcome, he filed an appeal to this court through his lawyer, Mr. Gichuki. Apart from the first ground in the initial petition of appeal , the grounds in the said petition are subsumed in the Supplementary Petition of Appeal filed by Mr. Gichuki on 6th October, 2017. The ten grounds contained in the latter petition principally challenge the weight of the prosecution evidence at the trial , and in addition raise an issue of bias on the part of the trial magistrate, and his alleged error in shifting the burden of proof upon the Appellant. The written submissions in support of the appeal compressed the grounds to six.

3. Regarding grounds 1, 2 and 8, the Appellant takes issue with the medical evidence, namely, the P3 and PRC forms which according to him were irregularly produced by **Jane W. Njoroge** (**PW1**) who was not the maker thereof. The submissions also pour cold water on the evidence of the complainant, citing the failure to report the defilement incidents to her mother, and the fact of the examination a month since the offence. Discrepancies on dates in the PRC and the P3 forms were highlighted, the Appellant submitting that the documents' value was thereby diminished. Moreover he stresses that they did not support penetration and therefore did not supply corroboration of the complainant's testimony

4. On grounds 5, 6 and 9 the Appellant argued that the court erred in its judgment by stating that the Appellant had a duty to challenge the prosecution evidence while exhibiting open bias as demonstrated in the language of the judgment and reliance therein on hearsay evidence. According to the Appellant, three crucial witnesses including the complainant's teachers were not called to testify, weakening the prosecution case. Finally the Appellant aims a shot at the sentence imposed, a matter not included in the grounds of appeal.

5. Opposing the appeal, Mr. Mutinda for the DPP defended the evidence of the complainant and medical evidence adduced at the trial. And relying on **David Mutune Nzongo -Vs- Republic [2010] eKLR** he submitted that there was no requirement for the prosecution to call any certain number of witnesses to prove an offence.

6. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa outlined the duty of the first appellate court in the following words:-

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."***

7. The prosecution case at the trial was that the complainant **F.W.N.** (**PW2**) was aged 17 years and a student at **S.M**. School. At the time of testifying she was accommodated at a safe house. She was a pupil in Standard 8 in primary school in 2013. She was living with her parents, her father, the Appellant herein, and her mother **T.N.** (**PW3**). It was the testimony of PW2 that on several occasions the Appellant found opportunities to defile her at home. When she joined Form 1 he also defiled her while escorting her to school and continued, not only to defile her, but to fondle her breasts and touch her genitalia as opportunities presented themselves.

8. When she reported to **PW3** she promised to talk to the Appellant but to no avail. The abuse continued even after PW2 joined Form 2. Eventually, she confided to her school teacher one **Mrs. K.** after an assault in late July 2015. **Mrs. K.** reported to the principal. The matter was reported to police on 27th July, 2015. The complainant was referred to the district hospital for examination. The Appellant was arrested and charged.

9. In a brief defence statement, the Appellant stated that he was a farmer at Maraigushu and that there was no proof that he committed the offence.

10. The court has considered the evidence on record and submissions on this appeal. There is no dispute that the Appellant was the complainant's father and **PW3** his wife. In the material period, the family lived together at Maraigushu.

11. The Appellant's submissions made heavy weather of the alleged absence of corroboration to the evidence of the complainant, dismissing the medical evidence therefore as unreliable. First of all the proviso to Section 124 of the Evidence Act allows a trial court trying a sexual offence to convict on the sole testimony of a victim, if it believes the testimony of the victim, giving reasons therefor.

12. In this case the complainant narrated the history of her abuse at the hands of her father , starting from 2013 when she was in class 8 all the way to July 2015 when the complainant was a Form 2 student. Apparently , the last straw was her defilement during the weekend before the matter was reported to **PC Habiba** (**PW4**). The Appellant did not cross-examine the complainant.

13. Contrary to the submissions on this appeal, the PRC form indicates that the complainant was first seen at the hospital on 29th July, 2015 at noon and the reference to the 27th July, 2015 under the space provided therein for date of examination must be a typographical error as the rest of the PRC form entries indicate 29th July, 2015 as the date of examination. Clinical notes based on the examination indicate the presence of a foul smelling discharge on PW2's genitals and that the hymen was broken. The P3 form indicates that the matter had been reported to police on 28th July, 2015 at 3.20pm rather than the 29th July 2015 when **PW4** testified to have received the report.

14. Nothing turns on these minor discrepancies. Or the fact that the P3 form was only completed on 20th August, 2015. It is quite possible that **PW4** did not issue a P3 form on the 29th July, and that the same was issued by a different police officer on 20th August, 2015. The P3 from clearly indicates the latter date to be when the complainant was referred to the hospital for the completion of the P3 form. This does not nullify the value of the PRC forms which are essentially clinical notes made in the first instance when the victim was examined and treated. The injuries in the P3 form are consistent with those clinical notes.

15. The P3 form and PRC forms were produced by a clinical officer by the name **Jane W. Njoroge** . At no time did she state that she examined the complainant. It was clear in her evidence that she was giving evidence on behalf of the examining hospital. The observation by the Appellant that an application ought to have been made by the prosecution to produce the medical reports through her therefore is correct. However the provisions of Section 77 of the Evdence Act provide for such a situation. There is no evidence that this minor slip on the part of the court prejudiced the appellant.

16. The failure by the trial court to seek the Appellant's view in the matter therefore does not vitiate the trial or render the evidence of **PW1** irregularly admitted. Indeed the Appellant cross-examined the witness after she testified. As I observed, even if the medical evidence was disregarded the trial magistrate could have properly based the conviction on the testimony of **PW2** alone. Evidently, the court believed the said testimony and gave reasons for this belief.

17. The failure by the prosecution to call the teachers to whom **PW2** first reported the assault cannot detract from her evidence. They were mere recipients of a report and not witnesses to the incident in question. Certainly, it is through their intervention after PW2 confided in them that brought the matter to light through a report to police. Moreover, the evidence of the complainant's mother **PW3** must be seen in that context. She stated that when she went to Naivasha Police Station:

> **"I was told that (Accused) had been raping her (Complainant). I was not aware of the incidences as reported. I used to work in the shamba and leave PW2 at home with the Accused and other children. ?PW2 continued the same (incidents). I did not talk to the Accused……. I have no problem with Accused but I feel bad."**

18. Caught between her husband and the daughter, PW3 seemingly chose to do what many women in her situation resort to: deny the truth and suppress the detection of incest in their homes. It is true that there is no evidence by **PW3** that she sought to 'resolve' the matter within the family. This was stated by **PW2** in her testimony. She said that after she made reports to **PW3**, she promised to "talk" to the Appellant, to no avail.

19. The trial magistrate, perhaps justifiably irked by **PW3's** conduct may have used colorful language in his judgment. That however cannot be a basis for concluding that he was biased against the Appellant. He analysed the evidence and was persuaded that **PW2** was a witness of truth and that medical evidence supported her evidence. The trial magistrate did not find any reason to doubt the evidence.

20. For my part, I cannot find any reason why **PW2** would make up such accusations against her father if the incidents complained of did not happen. Her testimony was systematic, lucid , detailed and consistent with the medical report and the admission by **PW3** that complainant used to be left with her father while **PW3** went off to her shamba. Penetration was proved through this evidence.

21. Concerning the duty to prove the charges, the onus lay with the prosecution and it was a misdirection on the part of the trial court to imply in the judgment that the Appellant somehow bore a duty to 'shake' the prosecution case. The Appellant did not cross-examine any of the key witnesses in the trial and his defence was in my view displaced by the prosecution evidence.

22. Reviewing all the foregoing I cannot find any merit in the grounds canvassed on this appeal. The Appellant was convicted on sound and credible evidence. I will therefore dismiss the appeal against conviction.

23. The Appellant was sentenced to life imprisonment. He has argued that the proviso to Section 20 (1) of the Sexual Offences Act does not create a mandatory sentence. This ground is not in the Memorandum of appeal. Nonetheless, the legality and extent of sentence could potentially be a matter of law, and this court has considered the provisions of Section 20 (1). In my considered view the proviso must be read with the Section in mind, and in this case, in consonance with Section 8 (3) of the Sexual Offences Act.

24. It cannot have been the intention of Parliament to create a lesser penalty for incest with a child than for the offence of defilement of a child of similar age. That would defeat common sense. Parents as care givers have the primary duty to protect their children from harm and when they deliberately visit harm upon their children, deserve appropriate punishment. For the purposes of this case, while I agree that the life sentence may not be mandatory, the sentence cannot fall below the minimum provided in Section 8 (3) of the Sexual Offences Act. However it can be higher in light of the proviso.

25. The appellate court does not interfere with the exercise of discretion by the trial court except where the discretion was not properly exercised, leading to a manifestly excessive punishment. In **Wanjema –Vs- Republic (1971) EA 493** the Court of Appeal for Eastern Africa set out the parameters as follows:-

> **"[The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

26. On my own part, having reviewed the circumstances of the offence, and the recent pronouncement by the Supreme Court in **Francis Karioko Muruatetu v Republic (2018) eKLR**, I do not consider the sentence imposed to be excessive. The Appellant abused his position as a guardian to the complainant and subjected her to several years of abuse from a tender age. There was no indication of remorse in his mitigation address which merely indicated that he wanted to get on with his life as if nothing significant had happened. That is callous, in the circumstances of this case. The sentence to life imprisonment was well deserved and is hereby confirmed.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 13th day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

Mr. Koima for the DPP

Appellant – B N M present

C/C – Quinter